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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 526.

SHELL OIL COMPANY,

Petitioner,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Respondent.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF FOR RESPONDENT PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK IN OPPOSITION.

KENT H. BROWN,
Counsel, Public Service Commission of the State of New York,
55 Elk Street,
Albany 1, New York.

Of Counsel:
BARBARA M. SUCHOW.

348 Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

TABLE OF CONTENTS.

	PAGE
Question Presented	1
Statement of the Case	2
1. The Issue	2
2. PSC's Attempts to Intervene in the FPC Proceeding	4
3. The Proceeding Below	9
Reasons for Denying the Writ	15
A. The Limited Scope of the Decision Below	15
B. The Limited Effect of the Decision Below in the FPC Proceeding	18
C. The Limited Precedential Significance of the Decision Below	19
D. Affirmative Reason for Denying the Writ	20

Table of Cases.

	PAGE
Atlantic R'fg Co. v. *PSC (Cateo)*, 360 U. S. 378 (1959)	2
Coastal Transmission Corp. et al., Doc. Nos. G-18338, *et al.*, Order on Rehearing Modifying Order Issuing Certificates, issued Nov. 2, 1961	19
PSC v. *FPC*, 361 U. S. 195 (1959)	2
PSC v. *FPC*, 287 F. 2d 143 (DC Cir. 1960)	2
PSC v. *FPC*, 284 F. 2d 200 (1960)	6, 14
PSC v. *FPC*, 287 F. 2d 146 (DC Cir., 1960), *cert. den.* 365 U. S. 880, 882 (1961)	2
Service v. *Dulles*, 354 U. S. 363 (1957)	11
Statement of General Policy No. 61-1, 24 F. P. C. 818 (September 28, 1960)	4
Texaco, Inc., 24 F. P. C. 979 (November 22, 1960)	4
Trunkline Gas Company, et al., 20 F. P. C. 720, 21 F. P. C. 133 and 394 F. P. C. Docket Nos. G-15394, *et al.*	5, 6, 7, 8
UGI and PSC v. *FPC*, 283 F. 2d 817 (9th Cir., 1960), *cert. den.* 365 U. S. 879, 881 (1961)	2
UGI and PSC v. *FPC*, 290 F. 2d 147 (5th Cir., 1961) *cert. den.* 366 U. S. 965 (1961)	2
UGI and PSC v. *FPC*, 290 F. 2d 133 (5th Cir., 1961), *cert. den.* U. S. (October 9, 1961)	2
UGI and PSC v. *FPC*, 287 F. 2d 159 (10th Cir., 1961)	2

Rules.

Rule 1.8(a)(1)	4, 8, 9, 10, 11, 13, 16
Rule 1.8(a), (2) and (b)	8, 9, 10

Statutes.

Natural Gas Act.

Section 15	16
Section 15(a)	16
Section 19(a)	14, 16, 17

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BRIEF FOR RESPONDENT PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK IN OPPOSITION.

Question Presented.

Should this Court (at the request of a natural gas producer) issue a writ of *certiorari* to review a decision (uncontested by the Federal Power Commission) of the Court of Appeals for the District of Columbia Circuit, which holds that one of the subdivisions of one of the Federal agency's administrative rules of practice and procedure, in its present form, authorizes the intervention of a State regulatory commission in the Federal agency's proceedings by the filing by such an intervenor of a notice of intervention?

Statement of the Case.

1. The Issue.

The issue upon which petitioner seeks to engage the attention of this Court—one which it characterizes as having "general importance in the interpretation . . . of the Natural Gas Act" (Pet., p. 8)—concerns the propriety of a Court of Appeals construction of a subdivision of an administrative rule of the Federal Power Commission (FPC), governing the method of intervention in that agency's proceedings by a State regulatory commission. This issue—one that obviously has nothing whatever to do with the "interpretation of the Natural Gas Act" and is concerned only with the meaning of a portion of an administrative agency rule—in this case is ancillary to another issue—one that is truly of "general [and great] importance" in the interpretation of the Act—which has been before the Court on several occasions within the last 2½ years. The latter involves the totally unjustified and unrestrained, drastic upsurgence in producer initial natural gas prices in the principal gas producing areas of the nation. *Atlantic R'f'g Co.* v. *PSC (Catco)*, 360 U. S. 378 (1959); *PSC* v. *FPC*, 361 U. S. 195 (1959); *UGI and PSC* v. *FPC*, 283 F. 2d 817 (9th Cir., 1960), *cert. den.* 365 U. S. 879, 881 (1961); *PSC* v. *FPC*, 287 F. 2d 146 (DC Cir., 1960), *cert. den.* 365 U. S. 880, 882 (1961); *UGI and PSC* v. *FPC*, 290 F. 2d 147 (5th Cir., 1961) *cert. den.* 366 U. S. 965 (1961); *Ibid.*, 290 F. 2d 133 (5th Cir., 1961) *cert. den.* U. S. (Oct. 9, 1961). See also *Ibid.*, 287 F. 2d 159 (10th Cir., 1961); *PSC* v. *FPC*, 287 F. 2d 143 (DC Cir. 1960).

The instant proceeding before the Commission, from which respondent's participation was barred, involved the same major issue. Petitioner there sought and, thanks to

the exclusion of the sole would-be protestant, obtained certificate authority from the FPC for a sale in Texas Railroad District 4, a vital source of supply area for New York-serving pipelines and New York gas consumers, at an initial price in excess of any previously authorized or paid in that district.[1] The sole substantive distinction between this proceeding and those heretofore before the Court—the crucial point upon which this case turned—lay in the fact that the gas purchaser in this proceeding was *not* a New York-serving pipeline.

However, as this Court itself immediately grasped in *Catco*, the first and leading high initial price case to come before it: "The price certificated [by FPC in its Catco certificate order] will in effect become the floor for future contracts in the area [*of gas origin*]." 360 U. S. at p. 390. And, as it had abundant occasion to observe in each subsequent case, that was precisely what occurred in the southern Louisiana area of the Catco production, notwithstanding the fact that entirely different purchasing pipelines were involved in each succeeding sale. The heart of the initial price problem, as this Court and everyone else familiar with the events of recent years is well aware, lies in the *source of supply area* in which an unprecedented initial price is first authorized; the *consuming area* which incidentally happens to be served by the particular purchaser involved in that acquisition, on the other hand, is

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[1] It is respondent's position that the record in the proceeding was totally inadequate to justify the Commission's decision that the sale was required by the public convenience and necessity at petitioner's price. However, the issue of the adequacy or inadequacy of the record to support the Commission's decision on the merits was not, of course, before the Court below nor is it before this Court on the present petition. In its present posture, this case raises only the issue of the propriety of the denial of respondent's intervention and participation in the proceeding and record on which the Commission's decision on the merits was entered.

entirely irrelevant to the central problem. For this reason it was apparent to us that the New York Public Service Commission (PSC) was compelled to intervene in *any* FPC proceeding in which it was proposed to elevate the existing initial price plateau in a vital source of supply area for New York gas consumers. The intensity of that compulsion may be gauged in retrospect by the fact that the price permanently certificated by the Commission for the first time in Texas Railroad District 4 in its instant authorization of petitioner's sale, did in fact become, and even now represents the Commission-condoned floor for subsequent contracts in that source of supply area, including contracts negotiated by New York-serving pipelines. *Statement of General Policy No. 61-1*, 24 F. P. C. 818 (September 28, 1960) and *Texaco, Inc.*, 24 F. P. C. 979 (November 22, 1960) (proceeding reopened by subsequent order).

2. PSC's Attempts to Intervene in the FPC Proceeding.

PSC filed a timely Notice of Intervention in the Commission's proceeding, the full text of which is quoted in the opinion of the Court below and in the instant petition for *certiorari* (Pet. App. C-3 and pp. 4-5. See also R. 38). The Court will note that respondent's Notice was in conformity, *verbatim*, with the provisions of the Commission's rule governing intervention by a State regulatory commission. Sec. 1.8(a)(1) of the Rules of Practice and Procedure, 18 C. F. R. 1.8(a)(1); (Pet. App. B-1). It was also an exact replica of literally scores of other Notices of Intervention which had been filed by respondent, without objection or opposition by anyone, in other FPC proceedings.

In order to explain clearly the ensuing sequence of events, it is necessary to interpose, at this point, a brief

description of the framework in which this proceeding was set. This case marked the second (and the cases with which it was consolidated below, the third and fourth) in a consecutive, systematic, 1959-60 series of endeavors by FPC to block PSC's participation *and, therefore, PSC's right to appeal from the decision on the merits*, in several high initial price proceedings which were, in all material respects, identical with the proceedings in which PSC's appeals were then pending before this and other reviewing courts (see cases cited on p. 2, *supra*). Had those endeavors been successful, of course, the appellate decisions in the then pending cases would have been substantially vitiated, as a practical matter, because many initial prices equal to or exceeding those in litigation would have been embedded, irretrievably, in the price structure of the affected producing areas by Commission decisions which had been rendered appeal-proof by the exclusion of the sole potential appellant.

The first proceeding in this consecutive series of PSC-exclusion endeavors was the *Trunkline* case. *Trunkline Gas Company, et al.*, FPC Docket Nos. G-15394, *et al.* There, as here and as in every other FPC proceeding in which respondent has intervened, PSC filed its standard Notice of Intervention. First, PSC's Notice was "denied" by the Commission (20 F. P. C. 720). Next, PSC applied for reconsideration. A month later, the Commission agreed to reconsider the matter without, however, otherwise altering its exclusion determination (unreported order issued January 5, 1959). Three weeks after that, on January 30, 1959, when the hearing (which had been in progress during all of this time) was on the verge of conclusion, the Commission issued another order granting respondent "limited participation", but again denying intervention

pending still further order (21 F. P. C. 133). The "limited participation" purportedly was offered for the purpose of according PSC an opportunity to present an evidentiary "showing" which would establish an interest sufficient to warrant its intervention in the proceeding, which was then almost completed. This order marked the first occasion on which the Commission attempted, *ex post facto*, to append a "showing of interest" requirement to the published version of its State regulatory commission intervention rule.

Notwithstanding the fact that the nature and basis of PSC's "interest" in *Trunkline* was self-evident to begin with and had been explained in detail in our earlier pleadings in the case in addition, we diligently, promptly and in good faith attempted to comply with the new requirement by tendering the demanded "showing" in the form of documentary evidence. On March 26, 1959, a month after this submission, the Commission issued still another order in *Trunkline*, announcing, for the first time, that its January 30 order had envisioned a *testimonial* rather than a *documentary* "showing" and that the former should have been presented at the hearing session which had convened in Washington one day after its January 30 order had been received at respondent's offices in New York (21 F. P. C. 394).[2]

Meanwhile, as indicated above, on March 13, 1959, PSC attempted to intervene by the usual Notice procedure in

[2] Although this completes the *Trunkline* background of the instant case, it by no means completes the *Trunkline* case itself *or* the story of PSC's four unsuccessful attempts to intervene in that proceeding. PSC subsequently instituted an appeal in *Trunkline*. However, on consolidated motions to dismiss PSC's *Trunkline* appeal and its appeal in this case, the Court below granted the motion in the former, on the ground that our petition for review was untimely, and denied the motion in the latter. *PSC* v. *FPC*, 284 F. 2d 200 (1960).

the instant FPC proceeding. We were (1) still firmly convinced of our right to intervene by the filing of Notice, according to the explicit provisions of the Commission's Rule 1.8(a)(1) and (2) quite unclear as to precisely what was required of us under the Commission's novel, recently announced and, in our view, entirely superfluous "showing of interest" procedure.

On March 26, the same day on which it rejected PSC's documentary "showing of interest" in *Trunkline* and disclosed for the first time that a testimonial showing had been contemplated, the Commission issued its "Order Permitting Limited Participation and Denying Intervention Pending Further Order" in this proceeding, again temporarily denying intervention and simultaneously purporting to accord respondent an opportunity to present a "showing" of our interest (R. 39-40). Both orders were received by respondent in the same mail delivery on March 30, 1959, one day preceding the scheduled commencement of hearings in the instant proceeding.

We wish to emphasize to the Court that, at this juncture, although considerably disillusioned by our repeated though apparently fruitless efforts to satisfy the Commission's intervention requirements in *Trunkline*, PSC was by no means willing to believe that it was *the fact of our participation* which was completely and unalterably repugnant to the Commission. We still accepted, at face value, its ostensible complaint that it was our *method of pursuing intervenor status* that somehow, mysteriously, constantly fell short of satisfying its newly revealed, endlessly proliferated, ever changing intervention requirements. And respondent's primary concern was to win recognition of its intervenor status. We did not consider it of crucial importance whether our intervention was accomplished

pursuant to FPC Rule 1.8(a)(1), specifically applicable to State regulatory commissions or pursuant to Rule 1.8(a)(2) and (b), applicable to other persons (as petitioners for intervention) or pursuant to the new "showing of interest" procedure, visible in no section of the Commission's published intervention rules.

Therefore, although convinced of our right to intervene by Notice, we were perfectly willing to comply with the "showing of interest" procedure, if that was what the Commission required. Therefore, although unable to detect the unique difference between a documentary and a testimonial "showing", we were perfectly willing to proceed with the latter, if that was what the Commission required. And so, on the day following receipt of the Commission's March 26 orders in *Trunkline* and in the instant proceeding, PSC appeared at the hearing in this proceeding and orally requested the issuance of subpoenas to compel the attendance of witnesses and the production of documents, not in our control, which were essential to permit us to make the testimonial "showing" apparently called for (R. 4, 6-8, 11, 13). The presiding examiner directed that respondent's requests be reduced to writing (R. 9). Within two days respondent had complied with this demand as well (R. 42-49). More than three weeks later, long after the hearing had closed, the Commission issued an order denying the request for subpoenas *on the ground that PSC's "allegations" of interest, which the Commission for months in this proceeding and in Trunkline, had been inviting us to prove up by means of a "showing", did not demonstrate that the evidence we sought to obtain through the subpoenas was "relevant and material" to the inquiry* (R. 69, 72)!

With this, our remaining sanguine illusions were completely shattered. Although, in our application for recon-

sideration of the Commission's orders denying our intervention and denying subpoenas, we earnestly requested to be disabused of the now inescapable conclusion that we had been launched on a wild goose chase in a vain and predoomed effort to furnish a "showing" in support of "allegations of interest" which the Commission deemed irrelevant and immaterial to begin with, no reassurance on the point was forthcoming (R. 74-83, 84-87).

At this point, it was clear *for the first time* that every administrative avenue for achieving intervenor status had been exhausted. By the same taken, it was also clear for the first time that the opportunity to seek judicial review was available.

3. The Proceeding Below.

In presenting its case to the Court below, respondent argued that its right to intervene in the Commission's proceeding was based on two sources. Once source was Section (a)(1) of Rule 1.8 of the Commission's Rules of Practice and Procedure, specifically applicable to intervention of State regulatory commissions and other public agencies having rate regulatory jurisdiction. The other was Sections (a)(2) and (b) of the same Rule, applicable to intervention by "any (other) person."

In support of its right to intervene by the filing of Notice, respondent relied on the brief, simple and unambiguous language of Section (a)(1) itself. Similarly, the majority of the Court below, after setting forth the text of that section in its opinion, held: "We read this language as meaning what it says; it grants permission to a State Commission to participate as intervenor by filing a notice of intervention" (Pet. App. C-5). The Court then proceeded to compare the simple Notice procedure provided

by this section for intervention by a State commission with the more elaborate procedures contemplated by Sections (a)(2), (b)-(f) of the same Rule, applicable to intervention by others. At the conclusion of its opinion and again in its opinion on rehearing, the Court below adverted to the fact that if the Commission wished to make more stringent its rule governing State regulatory commission intervention, it was at perfect liberty, *sua sponte*, to do so at any time, but concluded again that ". . . under the present rules the interest of a State Commission in intervening is shown when it files a notice of intervention, . . ." (Pet. App. C-7 and C-16).

The Court's last quoted statement, we respectfully submit, provides the short but complete answer to the second point argued by petitioner in its "Reasons for Granting the Writ" (Pet., pp. 14-17) and argued previously by both petitioner and the FPC in the proceeding below. PSC agrees, always has agreed and could not possibly disagree with petitioner's repeated insistence that Section 15(a) of the Act is addressed to intervention by "*interested*" State commissions. PSC and the Court below differ with petitioner only as to the method by which that "*interest*" is required to be established under the rules adopted by the Commission pursuant to the statutory authority conferred in that section. In our view and the view of the Court of Appeals, the eight lines comprising Section (a)(1) of Rule 1.8 admit of one answer only: the "*interest*" of a State regulatory commission is established by its filing of a Notice of Intervention.

In the proceeding below, the FPC itself conceded that the PSC-Court of Appeals view was correct in any proceeding involving a sale to a New York-serving pipeline. It insisted, however, that some other method was required

to establish PSC's "interest" in a proceeding involving a sale to a non-New York-serving pipeline. PSC did not, and does not now deny that the Commission could adopt and publish rules embodying that distinction if it chose to do so. We simply assert that it never has done so, either before or since the decision here sought to be reviewed. Neither we nor the Court below were able to detect anything in Section (a)(1) of Rule 1.8 as it was and is presently constituted, to lend the slightest support to the theory that the availability of the Notice procedure to a State Commission was dependent upon the specific nature of the proceeding involved. On the contrary, the rule itself expressly provides that that procedure is available to effect intervention by a State commission in "*a* [i.e., *any* FPC] proceeding." Administrative agency action that violates the agency's own rules may not stand. *Service* v. *Dulles*, 354 U. S. 363 (1957). No court has ever been reversed, as "transcend[ing] the appropriate scope of judicial review", for so holding (See Pet., p. 14).

Petitioner's *first* argument in support of its present request for *certiorari* (Pet., pp. 8-14) was also urged in its defense below of the Commission's exclusion order. In this argument, however, petitioner not only lacked the support of its co-respondent below but indeed took a position diametrically opposed to that asserted by the FPC.

Petitioner's thesis that respondent's appeal below was partially barred by PSC's omission to file an application for rehearing within thirty days of the Commission's order of March 26, 1959 (R. 39-41), necessarily depends on the underlying premise that the March 26 order was a "final" decision, immediately appealable after denial of its rehearing. FPC, on the other hand, the issuer of that order, contended vehemently to the Court below that its March 26

order did not constitute a "final", immediately appealable decision. In this controversy, respondent thinks it impossible not to agree with FPC.

Although we believe that both the title and the practical effect of the Commission's March 26 order, denying PSC's intervention *pending further order*, are sufficient to negate conclusively any suggestion of "finality", we find it unnecessary to rely on the language of the order alone. We believe the inherent fallacy of petitioner's thesis would be equally apparent even if the March 26 order contained no such specific finality-contradicting language at all. That fallacy lies in petitioner's apparent conception that PSC was attempting to enforce *two* separate, totally unrelated and individually appealable intervention rights in the Commission's proceeding; one, an "of right" or absolute right to intervene, and the other, a right to a Commission order permitting intervention. In its view, the Commission's order of March 26 constituted a final denial of respondent's first, or "absolute" right of intervention, requiring respondent (1) to seek rehearing within thirty days and to file a petition for review within sixty days while (2) simultaneously attempting to satisfy the requirement, embodied in the same March 26 order, that it establish "an interest which would serve as a basis for permissive intervention" (Pet., p. 9). In other words, according to petitioner, respondent was required to pursue its appeal from that part of the March 26 order which denied its intervention "of right" and, at the same time, to undertake compliance with that part of the same order which offered the prospect of permissive intervention.

We believe this thesis to be invalid on its face and, if pursued to its logical (or more accurately, its illogical) conclusion, to be utterly fantastic. We are at a loss to under-

stand how respondent conscientiously could have adopted petitioner's notion that we were legally "aggrieved" by denial of the right to intervene by *Notice* while the *right to intervene, per se*, was still ostensibly open (Pet., p. 11). We were, after all, concerned with the *substance* of the intervention right, not with its *form*.

Had respondent's pursuit of "permissive" intervention been successful before the Commission, we think that any pending appeal on the denial of its intervention "of right" would have become absolutely moot. On the other hand, had respondent's pursuit of "permissive" intervention been unsuccessful in the Commission, PSC would have found itself before the Court below, with *two* appeals seeking the same relief—*i.e.*, adjudication of its *single* right to intervene in the Commission's proceeding. We can conceive of no procedure which would have involved a greater or more unjustified imposition on the time and patience of the Court of Appeals than that apparently suggested by petitioner. Indeed, we think it must be unique in the annals of legal history for an appellant to seek review, particularly in this Court, because the respondent did *not* endeavor to split its cause of action below.

We believe the essential misconception on which petitioner's thesis is founded lies in its confusion between the *number of intervention rights* claimed by respondent and the *number of bases* upon which that right rested. We claimed, of course, only *one* right to intervene. We asserted, however, that there were *two* bases for that right within the Commission's Rule 1.8. Our attempts to enforce our *single* right of intervention comprised a *single*, continuing course of endeavor and the Commission's denials of that *single* right of intervention, which continued long after March 26, could give rise to only *one* cause of action on

appeal—a cause of action which could not arise until *all* administrative remedies had been exhausted.

However, as we argued below, even if the Court of Appeals, PSC and FPC were all incorrect in regarding the latter's March 26 order, de ying intervention pending further order, as a non-final decision and in regarding PSC's intervention right in the FPC proceeding as singular rather than plural, the Court still did not exceed its jurisdiction in deciding the case as it did. Petitioner's sole cited authority for its proposition that the thirty-day rehearing provision of Section 19(a) of the Natural Gas Act is a "jurisdictional" requirement, is a decision rendered in a related case (*Trunkline*) by the very Court that decided the present case—a decision the Court itself cited in the opinion here sought to be reviewed.[3] That case was concerned with the question of whether an appeal by an excluded would-be intervenor would lie from the Commission's decision on the merits in the proceeding from which the petitioner had been barred, or only from the Commission's final order denying the petitioner's intervention. To the extent that the DC Circuit's decision in that case has bearing on any issue raised by petitioner here, it simply corroborates the DC Circuit's decision in this case, for it holds that the properly appealable order in *Trunkline* was the last FPC order denying intervention, *not* the ultimate Commission determination on the merits *nor* the earlier Commission orders denying PSC's right to intervene by the filing of notice. However, the *Trunkline* decision offers no support whatever for petitioner's asserted "jurisdictional" character of the thirty-day rehearing provision, for the very simple reason that that issue was neither raised nor involved nor decided in that case.

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[3] *PSC* v. *FPC*, *supra*, ftn. 2. The decision is cited at ftn. 10 of the majority opinion below. Pet. App. C-8.

On the other hand, FPC's Rules (Section 1.13(d)) specifically authorize the Commission to extend the specified time for the filing of various documents and the Commission has, in fact, accepted late filed documents on numerous occasions. By *accepting* PSC's May 26 application for rehearing of its March 26 order (the application was *denied* on its merits by the Commission's order of July 16 rather than *rejected* as untimely—R. 84-87), the Commission must be deemed to have extended *pro tanto* any thirty-day or other time limitation.

Reasons for Denying the Writ.

We believe the Court will have perceived, long before this point, that the Court of Appeals decision here sought to be reviewed is much more limited in scope and far less complex than either the extraordinarily involved FPC background from which the case emanated or the "questions" that petitioner has attempted to read into it. Essentially, the Court below undertook simply to interpret an eight-line subdivision of one of the FPC's administrative rules of practice and procedure. It concluded that the language of that subdivision means what it says.

Respondent believes the Court of Appeals decision is eminently and manifestly correct. But we respectfully submit that even if some doubt on that score existed, this case presents no issue of any pertinence to the body of federal law or of sufficient importance, in this or any other respect, to justify petitioner's attempt to invoke review by this Court.

A. The Limited Scope of the Decision Below.

Although petitioner has asserted that the case presents "questions . . . of general importance in the interpreta-

tion . . . of the Natural Gas Act" and, in an attempt to substantiate the assertion, has endeavored to conjure up questions relating to the interpretation of Sections 15(a) and 19(a) (Pet., pp. 8-16), we think it obvious that the decision below does not purport to interpret these or any other provisions of the Act and does not raise any questions concerning their interpretation.

The complete text of Section 15 of the Act is set forth in the Court's majority opinion following its statement of the three consolidated cases below. Immediately following its quotation of the statute, the Court observes: "The Act (Sec. 15) is thus phrased in permissive terms. The permission, however, is to be controlled by such 'rules and regulations as it [the Commission] may prescribe.'" (Pet. App. C-4.) These two sentences comprise the totality of the Court's "interpretation" of Section 15. The majority opinion then proceeds: "The cases before us naturally are governed by the Commission's rules" (Pet. App. C-4-5). The entire remainder of the discussion and the decision is devoted to the Court's analysis of the aforementioned "Commission's rules", particularly Rule 1.8(a)(1).

But if the Court of Appeals "interpretation" of Section 15 of the Natural Gas Act is next to non-existent, its alleged interpretation of Section 19(a) is a figment of petitioner's imagination entirely. In fact, none of the three opinions below even cites or refers to that section of the Act, although, as petitioner points out, the Court of Appeals was accorded the full benefit of its theory as to the "jurisdictional" character of the thirty-day rehearing provision thereof. In our view, the simple and obvious reason why "the Court of Appeals did not come to grips" (Pet., p. 8) with petitioner's "jurisdictional thirty-day" theory is that it correctly regarded the entire issue as palpably spurious and patently irrelevant to the case.

As the tenor of the two majority opinions makes abundantly clear, the Court of Appeals simply rejected, out of hand and without comment, petitioner's essential underlying premise that PSC's single cause of action for review of the denial of its intervention should have been pursued as two separate causes of action; one for denial of its intervention "of right" and the other for denial of an order permitting its intervention. Accordingly, the Court also rejected petitioner's related premise that the Commission's March 26 order, denying intervention pending further order, was a "final" decision, ripe for appeal, on the "of right" issue only, after denial of rehearing. Therefore, the Court simply had no occasion to consider, and was not called upon to decide, whether the thirty-day rehearing provision of Section 19(a) was "jurisdictional" or not.

We respectfully venture to suggest that petitioner's gratuitous attempt to convert the Court's obvious rejection of its entire two-causes-of-action theory into a "*sub silentio* [holding] that respondent was not required to comply with Section 19(a)'s thirty-day jurisdictional limitation" (Pet., p. 13), is not as ingenuous as petitioner apparently would like it to seem. The real question petitioner wishes to pose to this Court, despite the emphatic, if implicit, negative answer given by the Court below, is whether an excluded State regulatory commission is required to pursue two separate appeals from the FPC's denial of its intervention in order to obtain complete judicial relief. Section 19(a) of the Natural Gas Act, and its thirty-day rehearing provision, simply happens to be the convenient statutory peg upon which petitioner has chosen to append this question.

B. The Limited Effect of the Decision Below in the FPC Proceeding.

Although not completely in accord with petitioner's depiction of the course of possible future FPC proceedings in this case (see Pet., p. 7), we agree with petitioner generally, that the most drastic and far reaching effect of the decision below will be to permit reopening of the proceeding in which, after excluding PSC, the Commission, on December 1, 1959, before it had the benefit of this Court's and other appellate court guidance on the proper interpretation to be accorded the *Catco* decision, authorized an unprecedented initial price for petitioner's sale in a gas producing area which is of vital importance to New York gas consumers. We note that this is precisely the course that already has been pursued by the Commission, with commendable promptness, in the two analogous proceedings which were consolidated with the instant case below.[4] We

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[4] We also think that the Commission's latest views on the intervention and initial gas price issues raised by these cases will be of interest to the Court in weighing petitioner's request for *certiorari*. In a recent order in the proceeding which was consolidated below as No. 15910, the Commission stated:

> "... A recent judicial decision holds that the Public Service Commission of the State of New York (PSC) was entitled to intervene in this case, and we intend to permit this party to exercise its right to participate in the development of evidence directed to determining what are the proper initial prices for the producers' sales.
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> "... After the court laid bare our error, all matters of administrative discretion were again opened for determination on remand and we were charged with the duty of exercising our discretion anew, of again judging the applications in the light of public convenience and necessity. Clearly, these facts justified our rescinding the September 19, 1960 producer certificates.
>
> "In addition, many events have taken place since September 19, 1960, which have a profound bearing on the producer price problem, and the public interest demands that we consider those matters too in determining the proper prices for the producers' sales. Following the decision of the Supreme

also agree that any future FPC decisions in this proceeding will have to be made on a record which includes the participation of PSC as a proper party. Meanwhile, however, petitioner's underlying sale may continue in effect uninterruptedly.

We wish to make it clear that respondent is no less irked than petitioner by the necessity for repetitious FPC proceedings. However, if the responsibility for that unfortunate necessity may be laid at any door, we submit the appropriate door is petitioner's rather than respondent's; for it was petitioner which vehemently opposed all of respondent's efforts to intervene in the FPC proceeding in the first place (R. 50-58) and petitioner which accepted the certificates issued by the Commission on December 1, 1959 with full knowledge that respondent's appeal from the denial of its intervention was pending in the Court below.

C. The Limited Precedential Significance of the Decision Below.

Although petitioner (Pet. p. 17) has raised the unwelcome (to it) specter of intervention by Notice in FPC proceedings by "*any* State commission . . . (and . . . the untold

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Court in the *CATCO* case reversing our issuance of unconditioned producer certificates, we have, with the issuance of our Statement of General Policy 61-1 on September 28, 1960, undertaken new methods of holding the line on initial producer prices. Also, several cases interpreting *CATCO* have been remanded to us by the courts basically on the grounds that our orders did not conform to the requirements of *CATCO*. We believe that in the light of these developments, the September 19, 1960 certificates must be set aside and the price issue considered anew in order to determine whether we would proceed the same way and reach the same result, had we the benefit of our Policy Statement and these court teachings."

Coastal Transmission Corp. et al., Doc. Nos. G-18338, *et al.*, Order on Rehearing Modifying Order Issuing Certificates, issued Nov. 2, 1961, Mimeo. pp. 5-6 (footnotes omitted).

number of regulatory bodies of *municipalities*)", we believe that the Court, in considering petitioner's appeal to its discretion, would be interested in a realistic appraisal of the widest conceivable general applicability, precedential significance and impact on the administrative process of a Court of Appeals' holding that PSC may intervene in FPC proceedings by the filing of Notice.

The opinion on rehearing of the Court below specifically negates any thought that its decision is necessarily to be deemed applicable to municipal bodies which exercise, among other powers, proprietary or quasi-private gas distribution functions (Pet. App. C-14-15). Accordingly, the maximum number potentially affected by the decision sought to be reviewed are the regulatory commissions of the 46 states which have natural gas consumption and the municipalities, if any, which exercise analogous, rate-regulatory, non-proprietary functions. Of these, over the last decade, only a handful have exhibited any concern whatever with FPC proceedings. Of the handful, only three (respondent, the California and Wisconsin Public Service Commissions) have participated actively in some proceedings. And, as the Court below observed twice: "We are cited to no instance of abuse of the right [to intervene by Notice, on the part of PSC or anyone else]" (Pet. App. C-7 and C-16).

D. Affirmative Reason for Denying the Writ.

Up to this point we have dealt with the *absence* of any issue in this case of sufficient importance to *impel* the discretionary granting of petitioner's request for a writ of *certiorari*. In our view, however, there is also one *affirmative* factor, of compelling and overwhelming importance, militating *against* the granting of the writ. It is the simple and acknowledged fact that the decision below and, perforce, any decision which might be issued by this Court,

may be rendered completely academic, at any time, by an FPC amendment of its administrative rule of intervention.

Throughout the proceeding below PSC conceded, in fact, urged, that FPC was perfectly free to eliminate the Notice of Intervention procedure for State regulatory commissions whenever it chose to do so, by a *sua sponte* amendment to its current, published intervention rule. The Court below emphasized the same point, not once but twice, in its majority opinion and its opinion on rehearing (Pet. App. C-7 and C-16). The Commission, however, whose administrative rule is the sole real subject of this controversy, has thus far evinced no disposition whatever to quarrel with the Courts of Appeals' interpretation of that rule, either by petitioning this Court for a writ of *certiorari* or by undertaking to amend the rule itself.

To recapitulate:

(1) This case concerns an interpretation, not of the Natural Gas Act, but of an eight-line subdivision of one of the FPC's administrative rules of practice and procedure.

(2) The issue upon which petitioner seeks review in this Court concerns, not the propriety of PSC's intervention *per se* in the instant or any other FPC proceeding, but the propriety of its intervention by the filing of Notice.

(3) Even if that issue were decided favorably to petitioner by this Court, the case would have to be remanded to permit the Court of Appeals to consider the other asserted ground for PSC's right to intervene in the FPC proceeding—a ground which already has been passed upon, favorably to respondent, by the concurring Judge below.

(4) The general legal significance of the intervention by Notice issue, absent any change in the language of the aforementioned disputed subdivision, is limited to the

method of acquiring intervenor status, available to a *handful* of *public* agencies, to whom *no abuse* of their rights under the subdivision has ever been charged; and

(5) Even that narrow significance may be eliminated completely, at any time, by the simple device of an FPC amendment of its rule.

Under the circumstances, we respectfully submit that petitioner's desire to engage the attention of this Court upon review of the decision below, for the sole sake of possibly sparing it the inconvenience of being required to justify its initial gas price in the presence of respondent and in the light of relevant initial price principles enunciated by this and other courts since the issuance of the original, 1959, FPC decision on the merits in the proceeding, is totally unjustified.

Respectfully submitted,

KENT H. BROWN,
Counsel, Public Service Commission of The State of New York,
55 Elk Street,
Albany 1, New York.

Dated: November 22, 1961.

BARBARA M. SUCHOW,
Of Counsel